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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1931

ARIZONA GROCERY COMPANY, PETITIONER

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

H. L. UNDERWOOD,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel.

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Pursuant to leave of the Court, the Interstate Commerce Commission, hereinafter referred to as the Commission, submits this brief to emphasize the importance to it and to the public of the questions presented in this case as to the power and authority of the Commission to award reparation to shippers.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 438) is reported in 49 F. (2d) 563.

The report of the Commission is in 140 I. C. C. 171 and at R. 18.

QUESTIONS PRESENTED

The question which is of importance in the administration of the Interstate Commerce Act is whether the Commission has power and authority to award reparation on shipments made on rates exacted by carriers subject to the Interstate Commerce Act, which were established pursuant to an order of the Commission fixing reasonable rates.

While other questions are raised by the respective parties, this brief will be confined in the main to a discussion of that question.

STATEMENT

The Proceedings Before the Commission

By its decision of June 22, 1921, the Commission found unreasonable the rates of $1.045 per hundred pounds on sugar from California points to Phoenix, Ariz., and that, for the future, rates on that commodity would be unreasonable to the extent that they exceeded 96.5 cents. (*Phoenix Chamber of Commerce et al.* v. *Director General*, 62 I. C. C. 412.) An order entered pursuant to these findings required the defendant carriers to establish rates which should not exceed 96.5 cents per hundred pounds.

In compliance with that order the carriers established a rate of 96 cents September 17, 1921. This was reduced to 86.5 cents July 1, 1922, pur-

suant to the recommendation of the Commission in *Reduced Rates, 1922,* 68 I. C. C. 676, by which a general reduction of 10 per cent in rates was held justified. On January 10, 1924, the carriers voluntarily fixed a new rate of 84 cents. (Finding 4 of District Court's Findings of Fact, R. 366.)

In a decision dated January 6, 1925, the Commission again considered the rate on sugar between California and Phoenix and found it to have been and to be unreasonable to the extent that it exceeded 79 cents prior, and 71 cents subsequent to July 1, 1922. Those complainants who had made shipments were held entitled to reparation. (*Phoenix Chamber of Commerce et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et al.,* 95 I. C. C. 244.) A rate of 71 cents was thereupon put into effect on February 25, 1925. (Finding 5 of District Court's Findings of Fact, R. 368.)

The orders involved in the instant case were made pursuant to the Commission's decision and order dated March 12, 1928, upon complaint filed February 9, 1925, in *Phoenix Chamber of Commerce et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. et. al.,* Docket No. 16742, 140 I. C. C. 171 (R. 18), which awarded reparation on shipments made between February 21, 1923, and February 10, 1925, upon which charges of 86.5 cents and 84 cents were exacted. In that case the Commission further considered the rates and held unreasonable, prior to July 1, 1922, rates in excess of 79 cents

and 81 cents from southern California and northern California points, respectively, to Phoenix, and from July 1, 1922, to the date of its order therein, rates in excess of 71 and 73 cents, respectively. For the future there were prescribed rates not to exceed 61 and 73 cents, respectively. (Findings 4 and 6 of District Court's Findings of Fact, R. 367, 368, 369.)

The Proceedings in Court

To enforce the reparation awarded, there were instituted in the United States District Court for the District of Arizona two suits which were consolidated for trial and a jury waived. (R. 118, 119, 240.) Findings of Fact and Conclusions of Law were made by the trial court (R. 355) and judgments in favor of complainants and against the defendant carriers were entered (R. 225, 228).

Upon appeal, the Circuit Court of Appeals reversed the judgments. (R. 463, 464.) A petition for certiorari was granted by the Court October 12, 1931. (R. 467.)

THE STATUTES

Pertinent in the consideration of this case are the following provisions of the Interstate Commerce Act as amended (U. S. Code, Tit. 49, c. 1):

Section 1 (4):

> It shall be the duty of every common carrier subject to this Act engaged in the

transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, * * *.

Section 1 (5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *

Section 8:

That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *

Section 13 (1):

That any person, firm, corporation, company or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be

specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15 (1):

Whenever, after full hearing, upon a complaint . . . or . . . under an order for investigation and hearing made by the Commission on its own initiative, . . . the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, . . . the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case . . .

Section 16 (1):

That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any

party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

SUMMARY OF THE ARGUMENT

A controverted question between the parties is whether an order of the Commission fixing *maximum* rates, which is conformed to by the carrier filing tariffs publishing a rate less than the maximum is a rate "fixed by the Commission." We leave to the parties discussion of that question and confine this brief to what appears to us to be the broader question, which is whether the rates exacted, upon which reparation was allowed, must be held to be *reasonable* rates, regardless of the facts, because established pursuant to order of the Commission.

Section 1 (4) requires carriers subject to the Act to "establish * * * just and reasonable rates, fares, and charges" and Section 1 (5) declares that "all charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable" and that "every unjust and unreasonable charge for such service * * * is prohibited and declared to be unlawful." Hence there is a continuing duty upon carriers to observe these mandates and the prescription of maximum rates by the Commission

does not absolve the carriers from that statutory obligation or authorize the continuance of a charge which by reason of changed conditions has become unreasonable and unjust. A reasonable rate may become unreasonable. *Baer Bros. Mercantile Co.* v. *D. & R. G. R. Co.*, 233 U. S. 479. Such an order is not *res judicata*. *Tagg Bros.* v *U. S.*, 280 U. S. 420, 445.

The basis upon which reparation is awarded is that a carrier has been guilty of a violation of the Act by exaction of an unreasonable rate—a tort. *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660. If the Commission finds the rate exacted unreasonable, it matters not that the rate at some time, prior to that for which reparation is awarded, was held to be reasonable by the Commission.

A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being litigated before the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award.

In the instant case, there are the added considerations that the finding of the Commission as a result of which reparation was awarded, was made upon a comprehensive record, as distinguished from a partial one, on which the prior maximum rates had been authorized, and that the rates here

involved were repeatedly under fire of the shippers.

The action of the Commission in awarding reparation was consistent with that in other cases.

In the present case the subsequent reduction of those rates by the voluntary action of the carriers warrants a conclusion that such reduced rates were not prescribed by the Commission. *Brimstone Railroad & Canal Co.* v. *U. S.*, 276 U. S. 104, 122; *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443.

ARGUMENT

I

There is a continuing duty upon common carriers subject to the Interstate Commerce Act to exact only rates, fares, or charges which are reasonable. The fixing by the Commission of rates as reasonable does not absolve the carriers from that duty

Section 1 (4) imposes upon carriers subject to the Act the *duty* "to establish just and reasonable rates, fares, and charges" for transportation, and Section 1 (5) prescribes that "all charges for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable * * *" and prohibits "every unjust and unreasonable charge * * *" and declares it unlawful.

It is clear, therefore, that the initiation of rates is left to the carriers with the specific injunction for reasonableness, and the determination of reasonableness rests upon the carriers in the first in-

stance. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439; *I. C. C.* v. *L. & N. R. R.*, 227 U. S. 88, 92. Now, since a reasonable rate may become unreasonable and a rate reasonable at one time does not necessarily remain so for all time, *Tagg Bros.* v. *U. S.*, 280 U. S. 420, 445, it is likewise clear that there remains with the carriers the ever-present, continuing duty of keeping rates in harmony with the changing conditions and the shifting circumstances by which the question of reasonableness must be judged. There is no time limitation in the statute of the responsibility of the carriers with respect of reasonable charges. The Act prohibits every excessive charge, and its provisions are designed to prevent evasion of the rule that every charge for transportation shall be just and reasonable. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660.

The function of the Commission, as compared to the carrier, with respect to rates is secondary and revisory. That is, the Commission either on complaint or upon its own motion, pursuant to the authority of Section 15 (1) considers rates already established by the carriers. These rates presumably reflect the latters' judgment of reasonableness. Upon the developments of its investigation the Commission determines the reasonableness of the rates involved and prescribes what is or shall be a reasonable rate, thus substituting its judgment for that of the carriers, in cases

where it finds unreasonableness. Such a determination, while necessarily and in terms looking to future operation, is, of course, predicated upon the then existing conditions and circumstances. But the *reasonable* rate of to-day may be the *unreasonable* rate of to-morrow. *Topeka Traffic Assn.* v. *A. & V. Ry. Co.*, 27 I. C. C. 428, 433. "The world and its myriads of affairs are never the same two days in succession." *Atchison, T. & S. F. Ry. Co.* v. *U. S.* (Western Grain Rate Case), 51 F. (2d) 510, 516.

When the language of Section 1 (4) and (5) is contrasted with that of Section 15 (1), it will be seen that there is no duty imposed upon the Commission such as that imposed upon the carriers. The provisions of Section 15 (1) are that the Commission may, upon its own motion, and must, upon complaint, inquire into the reasonableness of rates and prescribe reasonable rates when deemed proper. That falls far short of making it the *duty* of the Commission to see that rates are kept currently reasonable. But Section 1 (4) and (5), as we have seen, does impose that duty upon the carriers. There are good reasons for this.

A carrier is in much better position than the Commission to determine as to particular rates whether conditions in respect of operation, transportation, cost of service, markets, etc., have so changed as to warrant a different conclusion as to the reasonableness of rates previously established

as such either by itself or by the Commission. Thus the wisdom of Congress in placing the obligation on the carriers is shown. The fact that the Commission has taken no action to revise a rate once established by it as reasonable does not relieve the carrier of its duty under the law. The carriers may not shut their eyes to the vicissitudes of business and transportation and rest supinely upon a more or less distant past finding of the Commission.

It can not in reason be asserted that the Commission is under the necessity of constantly supervising and readjusting thousands of rates, involving many carriers to the end that when once established they be kept currently reasonable at all times. Surely, Congress intended no such burden to be imposed, and the statute is evidence of that.

The basis on which the decision of the Circuit Court of Appeals was predicated was that while, in exercising its rate-making functions, the Commission is not bound by any doctrine of *res judicata*, since it is acting in its administrative or legislative capacity, yet in awarding reparation it acts in a judicial capacity; that since it had in effect in 1921 prescribed as a reasonable or lawful rate a maximum rate not to exceed 96.5 cents, that rate was a Commission-made rate and hence could not be said to be unlawful until changed by it, and therefore exaction of such rate prior to the change could not be said to be unlawful—a tort—constituting a basis for reparation. But the provisions allowing rep-

aration presuppose a reasonable rate that may become unreasonable. (Compare *Baer Bros.* v. *Denver & Rio Grande R. R.*, 233 U. S. 479, 488.) The carrier's duty is not discharged by merely *establishing* a reasonable rate as required by Section 1 (4). It must not charge that rate if it becomes unreasonable, otherwise Section 1 (5) is violated.

We think there is no difference with respect to reparation between a rate established by the carrier and one established by order of the Commission. The Act makes none. The sole question is whether for the period for which reparation is sought, the rate exacted was unreasonable, that is, has there been a violation of the Act? Reparation is allowed for the collection by a common carrier of *exorbitant* charges, which constitutes a tort. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra.* The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate. *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 240.

As a basis for reparation, either in a proceeding before the Commission or in the courts, *Penna R. R.* v. *Clarke Coal Co.*, 238 U. S. 456, 469, 470, there must be a finding that the rate exacted was unreasonable and hence unlawful. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra,* at p. 661.

While in fixing a rate for the future the Commission exercises a legislative function, *Prentis* v.

Atlantic Coast Line, 211 U. S. 210, 226, yet strictly speaking the rate for the future has no relevancy to the reparation claim since the award of reparation is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper arising from a violation of the Act by the carrier. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order. *Baer Bros.* v. *Denver & Rio Grande R. R., supra,* at page 486.

A distinction should be noted between a *legal* rate and a *lawful* rate. Whether fixed by the carrier voluntarily or pursuant to an order of the Commission, if the provisions of Section 6 requiring filing and posting of schedules is complied with, the rate specified therein is the *legal* rate from which the carrier may not depart. (Sec. 6 (7).) *Texas & Pacific Ry.* v. *Cisco Oil Mill,* 204 U. S. 449; *Keough* v. *C. & N. W. Ry. Co.,* 260 U. S. 156, 163. That is so even though that rate is in violation of law. *Davis* v. *Portland Seed Co.,* 264 U. S. 403.

This distinction between a *legal* and a *lawful* rate is pointed out in *Arkansas Fuel Co.* v. *C. M. & St. P. Ry. Co.,* 16 I. C. C. 95, where the Commission said (p. 97):

> But the first section of the act, following the rule of the common law, declares that all charges for services rendered by a carrier

> in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or a schedule of rates the carrier therefore acts under this admonition of the statute. If it promulgates a rate in violation of this injunction, that is to say, if it establishes a rate that is excessive and therefore unjust and unreasonable, it is not a lawful rate when its reasonableness is subsequently questioned upon complaint filed. While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication can not make a rate lawful that is unreasonable and excessive. No rate can be lawful, in the sense of being immune from attack, either with respect to past or future shipments, if it be excessive and unreasonable in amount.

If the requirements of Section 1 (5) are kept in mind, there can be no inconsistency in awarding reparation for the exaction of a "Commission-made rate," which is in effect the *legal* rate until changed, but not necessarily the *lawful* rate, if subsequently it becomes in fact unreasonable.

The Fifth Circuit Court of Appeals in *Eagle Cotton Oil Co.* v. *Southern Railway Co.*, 51 F. (2d) 443, considered a case involving facts quite similar to those in the case at bar. In that case the trial court had denied a recovery sought under a rep-

aration order of the Commission on the ground that the rate exacted was a Commission-made rate. The Court of Appeals' judgment of reversal was rested upon the proposition that the rate was not Commission-made but carrier-made, but Circuit Judge. Hutcheson placed his concurrence on the broad ground that it is immaterial whether the rate made the subject of the reparation order was Commission-made or carrier-made, if the shipper has been injured by it.

In his concurring opinion, page 445, he referred to the fact that Congress in the Act has placed upon the carriers the burden of establishing and maintaining just and reasonable rates, that the Interstate Commerce Commission under its grant of authority has, by practice and in its decisions, sanctioned and approved by the courts, built up for itself a character of flexibility in the approach to, the consideration and determination of, rates and practices, and the results flowing therefrom in which the principle of *res judicata* has had and can have no just place; that Congress has not changed this settled character of the Commission, although it might have, if it so willed, converted it into a body like the state commissions, which fix and prescribe rates in a rigid and final way binding on both carrier and shipper, except for appeal to the courts. Further, with respect to the system under which the Commission functions, he said (p. 447):

* * * This system permits rates to be experimentally laid down and experimentally tried out. It preserves that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.

This system, without fixation or rigidity, leaves it to the Commission to deal justly and fairly by carrier and shipper alike, authorizing it to use its powers to effect and maintain a reasonable rate structure through constant experiment and change, while preserving to it the right at any time upon complaint to relieve by specific reparation awards those who have suffered from the temporary or particular inequalities and imperfections of this rate structure.

For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable, and wholly without legal warrant.

II

The order of the Commission awarding reparation was predicated upon a finding made upon a comprehensive record which for the first time presented fully the question of the reasonableness of the rates involved. The action of the Commission was consistent with its action in other cases

In its report awarding reparation, 140 I. C. C. 171, the Commission said (p. 180):

> Defendants contend that they should not be required to pay reparation on shipments which moved under rates approved or prescribed by us. We have several times announced that the doctrine of *res adjudicata* is not applied by us. *Goss* v. *Director General,* 73 I. C. C. 649. We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then

it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation upon adequate proof that they paid or bore such charges.

It has taken like action in other cases: *Eagle Cotton Oil Co.* v. *Southern Ry. Co. et al.*, 140 I. C. C. 131; *Arizona Corporation Commission* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 156 I. C. C. 418, 425, 426; *Brannon Coal Co.* v. *Southern Ry. Co.*, 157 I. C. C. 486, 487.

The basis upon which reparation is awarded is that a carrier has been guilty of a violation of the Act—in this instance by exaction of an unreasonable rate resulting in a tort. *L. & N. R. R.* v. *Sloss-Sheffield Co., supra; Lewis-Simas-Jones Co.* v. *Southern Pacific Co., supra.* If the Commission finds that the rate exacted is unreasonable, it matters not that at some time prior to that for which reparation is awarded the rate was held to be reasonable. A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being investigated by the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award. It would destroy the right given by the statute (Sec. 16 (3) (b)) whereby reparation may be allowed for a period two years prior to the filing of the complaint. *Louisville Cement Co.* v. *I. C. C.*, 246 U. S. 638.

It would amount to a declaration that a prior established reasonable rate, which had become unreasonable, was still reasonable. This would in effect amend the Act in so far as it prohibited and declared unlawful the exaction of an unreasonable charge.

Moreover, the record discloses that the rates on sugar from California to Phoenix were the subject of much consideration by the Commission. The case which resulted in the order of June 22, 1921, 62 I. C. C. 412, was the first of three cases. (Findings of Fact 4–6 of the District Court, R. 366–369.) So it may fairly be said that there was constant agitation about the rates. In *Southern Cement Rates,* 132 I. C. C. 427, one of the cases included therein sought reparation. The Commission adverted to the fact that as a general rule reparation had been denied where general readjustments had been made in extensive territories. Considering whether there were any circumstances which should take the case out of the general rule, it was said (p. 467):

> * * * The evidence further shows that this complainant has for the past eight years been endeavoring to secure a lower basis of rates, one more in line with the rates which its competitors have enjoyed, and has kept the carriers constantly informed of its desires. It has had reason to believe, indeed, that such reductions would be forthcoming.

III

It may well be urged that the rates involved were not "Commission-made"

We present this point because we consider it our duty to do so. However, the main interest of the Commission is in the question hereinbefore discussed of the power of the Commission in respect of reparation involving Commission-made rates, since a decision on that point will serve as a guide and authority in its administration of the Interstate Commerce Act.

The order of June 22, 1921, in the "first" *Phoenix case* required the establishment of rates not in excess of 96.5 cents per cwt. The carriers established a rate of 96 cents; this was voluntarily reduced to 86.5 cents pursuant to the recommendation of the Commission in *Reduced Rates, 1922*, 68 I. C. C. 676, by which a general reduction of 10 per cent in rates was held justified. On January 10, 1924, the carriers voluntarily fixed a new rate of 84 cents, which remained in effect until February 25, 1925 (District Court's Findings of Fact 4 and 5, R. 367, 368).

In *Eagle Cotton Oil Co.* v. *Southern Ry., supra*, upon quite similar facts, the Circuit Court of Appeals held that the rates there under consideration were not "Commission-made." In the opinion, after discussing the changes made in the rates, it was said (p. 445):

* * * The most that can reasonably be contended for in support of the proposition adopted by the trial court that the $2.03 rate was Commission-made is that it resulted from adding to and building up the rate of $1.20 that was authorized by the Commission. Aside from the fact that the Commission's order entered in 1915, establishing the $1.20 rate, had expired by limitation long prior to the decisions in Ex Parte 74 and in Reduced Rates, 1922, the law, as we understand it, is that orders of the Commission authorizing a general upward revision or adjustment of rates are not to be construed as giving approval of or prescribing particular rates. In Brimstone R. & Canal Co. v. United States, 276 U. S. 104, at page 122, the Supreme Court said: "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve or fix any particular rate. . . . In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates—and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration." It is true that case was dealing with a division of rates, but the principle involved is the same here as it was there. The Supreme Court in that case cited with approval, among other decisions of the Commission, Steel & Tube Co. v. Director General, 61 I. C. C. 526, in which the Commission

said that its "sanction of a general adjustment does not carry with it the approval of any particular rate."

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals was erroneous and should be reversed and that the judgment of the District Court awarding damages should be affirmed.

H. L. UNDERWOOD, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel.

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